

No. 05-467 OCT 7 - 2005

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In The  
**Supreme Court of the United States**

MIGUEL ANGEL RAMOS,

*Petitioner,*

v.

ALBERTO R. GONZALES,  
Attorney General of the United States,

*Respondent.*

**On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The Seventh Circuit**

**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTION PRESENTED

An alien whose drug offense is expunged pursuant to 18 U.S.C. § 3607, the Federal First Offender Act, will not be removed from the United States. An alien who meets the requirements of 18 U.S.C. § 3607 but has his drug offense expunged pursuant to state law will be removed from the United States. In the decision below, the Seventh Circuit held such an inconsistency does not violate equal protection. The Ninth Circuit held this inconsistency impinges equal protection principles. This conflict has created a situation whereby the life altering event of removal turns on the vagaries of geography. The question presented is:

Whether Mr. Ramos' equal protection rights were violated because his removal was based solely on the fortuity his conviction was expunged under state law rather than federal law.

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## **PETITION FOR A WRIT OF CERTIORARI**

Miguel Angel Ramos respectfully petitions this Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit in this case.

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## **OPINIONS BELOW**

The opinion of the Seventh Circuit is reported at 414 F.3d 800 and is set forth in the Appendix ("App.") at 1. The Board of Immigration Appeals' decision (App. 12) is unreported. The Immigration Judge's oral opinion (App. 15) is also unreported.

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## **STATEMENT OF JURISDICTION**

The Seventh Circuit filed its decision on July 12, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the Circuit Court's decision on a writ of certiorari.

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## **STATUTES AND CONSTITUTIONAL PROVISION INVOLVED**

The pertinent statutes and constitutional provisions are reproduced in the Appendix. The statutes include 18 U.S.C. § 3607, the Federal First Offender Act, 8 U.S.C. § 1101(a)(48)(A), the Illegal Immigration Reform and Immigrant Responsibility Act, and Neb. Rev. Stat. § 29-2264(2). The constitutional provision implicated is the Fifth Amendment.

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## STATEMENT OF THE CASE

Miguel Angel Ramos is a twenty-nine-year-old native and citizen of Mexico who resided in the United States for over eleven years. Mr. Ramos had an I-130 family petition approved for his benefit on August 17, 1992. App. 28. Mr. Ramos has a wife and child, both United States citizens. App. 29. While Mr. Ramos is in Mexico upon his removal from the United States following the decision of the Board of Immigration Appeals ("BIA"), his wife and child reside in Nebraska.

The events culminating in Mr. Ramos' removal began on August 22, 2000, when he was convicted for attempted possession of a controlled substance in violation of Neb. Rev. Stat. §§ 28-201 and 28-416 in the County Court of Hall County, Nebraska. App. 2. Mr. Ramos pleaded *nolo contendere*. App. 3. His sentence consisted of a \$500 fine plus court costs and witness fees, with no incarceration or probation. App. 3.

On January 24, 2003, Mr. Ramos appeared for an adjustment of status interview in Omaha, Nebraska. App. 3. At that point, he was arrested, placed in custody, and served with a Notice to Appear. App. 3. The Notice to Appear alleged that as a result of his violation of Neb. Rev. Stat. §§ 28-201 and 28-416, Mr. Ramos was subject to removal from the United States based on 8 U.S.C. § 1182(a)(6)(A)(i) and 8 U.S.C. § 1182(a)(2)(A)(i)(II). App. 3.

Mr. Ramos filed a motion to set aside his drug conviction. On March 18, 2003, the Hall County Court sustained his motion to set aside his conviction, pursuant to Neb. Rev. Stat. § 29-2264. App. 19. Section 29-2264(2) enables individuals convicted of a misdemeanor to petition the sentencing court to set aside the conviction. The court

noted all civil disabilities and disqualifications imposed as a result of the conviction were removed. App. 19.

Removal proceedings began on March 24, 2003 with Immigration Judge James R. Fujimoto ("IJ") presiding. App. 4. Mr. Ramos contended his conviction was expunged and therefore he was not removable. The IJ found otherwise. The IJ relied on *Matter of Roldan*, 22 I. & N. Dec. 512 (BIA 1999), for the proposition that "no effect is to be given in Immigration proceedings to a state action which purports to expunge, dismiss, cancel, vacate, discharge or otherwise remove a guilty plea or other record of guilt or conviction by operation [sic] by a state rehabilitative statute." App. 16. The IJ ruled the conviction final for immigration purposes and ordered Mr. Ramos' removal. App. 18.

Mr. Ramos appealed to the BIA. During that time, the Nebraska State Court reissued Mr. Ramos' earlier expungement order. App. 26. In the June 18, 2003 order, the court clarified: "since the Defendant was sentenced to a fine only, that rehabilitative efforts of the Defendant are not considered or relevant under Nebraska Revised Statutes § 29-2264, and the Defendant is entitled to have said judgment set aside without a showing of rehabilitation." App. 26.

The BIA affirmed the IJ on October 24, 2003. App. 12. The BIA agreed that the Nebraska law under which Mr. Ramos' conviction was set aside was a rehabilitative statute and, consequently, his conviction was final for immigration purposes. App. 13-14. The BIA was silent on the equal protection issue.

Mr. Ramos appealed to the Seventh Circuit, arguing an equal protection violation. He asserted that when

Congress defined "conviction" in 8 U.S.C. § 1101(a)(48)(A), it did not repeal 18 U.S.C. § 3607, the Federal First Offender Act (FFOA). A conviction under the FFOA would be expunged for immigration purposes. However, Mr. Ramos' conviction, which met the requirements of the FFOA, was expunged pursuant to state law and therefore was not recognized for immigration purposes. Mr. Ramos asked the Seventh Circuit to find this inconsistent treatment contrary to equal protection of the laws, relying on the Ninth Circuit's decision in *Lujan-Armendariz v. INS.*, 222 F.3d 728 (9th Cir. 2000), which found an equal protection violation. The Ninth Circuit saw "no rational basis for a federal statute that treats persons adjudged guilty of a drug offense under state law more harshly than persons adjudged guilty of the identical offense under federal law, [thus] the petitioners [could] not be deported for their first-time simple drug possession offenses." *Lujan-Armendariz*, 222 F.3d at 749.

In the decision below, the Seventh Circuit, in direct conflict with the Ninth Circuit, found no equal protection violation. App. 10-11. It determined that "the BIA (as well as Congress) reasonably might have thought that the law should entitle only persons who actually have been charged and sentenced under the FFOA to leniency for immigration purposes." App. 11. The Seventh Circuit relied on an earlier decision, *Gill v. Ashcroft*, 335 F.3d 574 (7th Cir. 2003). App. 10. In *Gill*, the Seventh Circuit determined a petitioner's expunged conviction was final for immigration purposes because "expungements (or restorations of civil rights) under state law do not negate a 'conviction' for purposes of immigration law." *Gill*, 335 F.3d at 577. The Seventh Circuit took *Gill* one step further,

finding recognition of federal but not state expungements was consistent with equal protection principles. App. 11.

The decision below rejected the Ninth Circuit's approach in *Lujan-Armendariz* by simply invoking *Gill*. However, a cursory review of *Gill* reveals the Seventh Circuit's true interpretation of *Lujan-Armendariz*: "[t]he holding of *Lujan-Armendariz*, which elevates an abandoned administrative practice over a statutory text, is untenable, and we decline to follow it." *Gill*, 335 F.3d at 579. The Seventh Circuit further noted that "[d]epriving a statute of any consequence is serious business, which *Lujan-Armendariz* did not adequately justify." *Id.* at 578. Finally, the *Gill* Court, and the *Ramos* Court by its reliance on *Gill*, acknowledged "this decision creates a conflict among the circuits." *Id.* at 579.

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## REASONS FOR GRANTING THE PETITION

### I. The Seventh Circuit Deepened An Existing Split As To Whether The Benefits Of 18 U.S.C. § 3607 Should Be Extended To Aliens Whose Offenses Are Expunged Under State Rehabilitative Laws.

The Seventh Circuit's decision has added to the division of legal authority on the question presented for which conflicting interpretations of Constitutional law exist. On the one hand, the established law of the Ninth Circuit is that a petitioner's expunged state narcotics conviction cannot be the predicate for a removal order because he was eligible for amelioration under the FFOA. *Lujan-Armendariz*, 222 F.3d at 749. On the other hand, the Third, Fifth, Seventh, and Eleventh Circuits have